In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1455

LEONARD L. BURSTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) [1] is reported at 453 F. 2d 605.

JURISDICTION

The judgment of the court of appeals was filed on December 28, 1971 (Pet. App. 16). A petition for

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[1] "Pet. App. " refers to the separately bound "Appendixes" (continuously paginated) filed with the petition. "R." references are to the record appendix filed in the court of appeals (No. 30224).

rehearing was denied on March 9, 1972 (Pet. App. 17). On March 30, 1972, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to May 8, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain remarks of the prosecutor in closing argument to the jury constituted an impermissible comment on petitioner's failure to testify and, if so, whether the error was cured by the instructions given to the jury.

STATEMENT OF THE CASE

Petitioner, an attorney (R. 361), was convicted after a jury trial (R. 835-837), for willfully attempting to evade $93,093.40 in tax liability on a 1957 income tax return (R. 122, 143-148) which petitioner filed in 1960, and in which he claimed a $160,000 capital gain from the sale of certain real estate and a $140,000 carry-over capital loss allegedly suffered in connection with a 1950 investment in Kadison Corporation.

In the first trial on this indictment, petitioner testified that the $140,000 capital loss arose, not out of his investment in Kadison Corporation, but out of a transaction in 1957, wherein he gave his wife a $140,000 interest in real estate to satisfy her demand for restitution of eleven shares of East Corporation stock which he had borrowed from her and lost by foreclo-

sure after pledging them as collateral for a personal loan. An attorney, William J. Goldworn, testified for petitioner in the first trial that he had participated in this 1957 transaction and had advised petitioner that the $140,000 item could properly be claimed on his return as a capital loss. The first trial resulted in a conviction which was reversed by the court of appeals because of the district court's prejudicial comments and its refusal to instruct the jury that reliance by petitioner on advice of competent tax counsel would be a defense. *Bursten* v. *United States*, 395 F. 2d 976 (C.A. 5).

At the outset of the retrial proceedings, petitioner's counsel informed the jury in an opening statement that the evidence would show the $140,000 transfer to petitioner's wife, and that petitioner had relied on Goldworn's advice in claiming the capital loss (R. 94-104). The government's evidence tended to prove, first, that the $160,000 received by petitioner in 1957 allegedly from sale of a tract of land actually constituted regular income for personal services (R. 95, 199-204, 281-282). Second, as to petitioner's reported capital loss, the government's evidence tended to prove that, in prior audits of petitioner's tax returns for 1952, 1953 and 1954, petitioner had claimed and had been allowed a $3,800 capital loss arising out of the Kadison investment, and had claimed certain other losses which had been allowed, but only to the extent that $4,084.40 had been left as a loss carryover for 1957 (R. 187-199). At the conclusion of the

government's case, petitioner rested his own case without calling any witnesses or introducing any evidence (R. 486).

Petitioner's counsel, in his closing argument to the jury, stated that petitioner had decided to introduce no evidence on the $140,000 loss because the government, in what counsel suggested was an attempt at concealment, had failed in its duty to produce all the witnesses and specifically failed to produce the particular revenue agent who was assigned to examine the 1957 tax return (R. 639-642).[2] On the reported gain from the sale of land, he argued (R. 631-633) that the sales agreement was conclusive in reciting that petitioner was paid $160,000 for a property interest and that it refuted the testimony of the government's witness, Jack D. Burris, who had testified that he had acted as legal adviser for petitioner's co-venturers and that petitioner was paid by them for personal services (R. 246, 281-282) in promoting the real estate transaction.

In his reply argument, the prosecutor asked the jury to compare the opening statements with what the government had proved (R. 652) and, upon defense objection, the court instructed the jurors (R. 653) to follow its prior instructions[3] to base their verdict on the

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[2] This agent, Bernard Jaffe, was present at the trial under government subpoena (R. 64, 810, 814). Prior to the trial, petitioner's counsel interviewed Mr. Jaffe and was furnished his official reports (R. 814; Supp. R. 74-77).

[3] The court had previously warned the jury that statements of counsel were not evidence (R. 73). A similar admonition was included in the charge (R. 683).

evidence and the court's charge on the law. The prosecutor thereafter said (R. 654):

> There is one other point in that connection. I submit to you that the defense panicked in this case. I submit to you they didn't think the Government could do it. It did go back some years. Kadison showed up. Sawyer showed up. Burris showed up. Adcock showed up. They panicked. They couldn't put on a defense, I submit to you. That's what happened.
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> * * * *
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> I submit to you that the Government did put on a case here and that the Government did prove its case and the defense argument comes down to arguing about some ambiguity in the return.

A defense objection and motion for a mistrial (rather than for curative instructions) was denied by the district court for the following reason (R. 656):

> The basis for the ruling is that Mr. Wheeler several times in his argument to the jury explained to the jury, in sort of a short, crisp and cursory way, that it wasn't necessary for them to put on any case for certain reasons, and I feel that that opened up and made proper—I won't say proper, but legitimatizes the comment made by counsel for the Government.

The district court, on the ground that it was already covered in the court's prepared charge (R. 589-594, 740) denied petitioner's request (Pet. 3-4; R. 740) to instruct the jury on the government's burden to prove the offense beyond a reasonable doubt and on a defendant's right to rest his case without producing evidence and to do so free of adverse inferences

based on his exercise of that right. The district court repeatedly gave correct instructions on the government's burden of proof (R. 599-600, 660-662, 667, 669, 670, 672, 674). The jury were instructed fully on a defendant's right not to testify and on the jury's duty to attribute no significance to his exercise of that right (R. 669), and it was instructed that the "defendant is under no obligation or duty to prove his innocence" (R. 660). Petitioner's counsel repeatedly reminded the jury that petitioner was exercising these rights in this case (R. 625, 639, 641, 642, 643) and the prosecutor freely acknowledged that the government's burden of proof remained constant to the end of the trial (R. 601-602). In response to the court's request for suggestions on additional charges, petitioner's counsel stated he was "absolutely satisfied" with the court's charge to the jury (R. 686, 801-802, 804-806).

The court of appeals affirmed, holding that the prosecutor's "comments did not constitute prejudicial error and are harmless beyond a reasonable doubt" (Pet. App. 13).

ARGUMENT

1. Contrary to petitioner's interpretation (Pet. 5), the opinion of the court of appeals approved as free from error (Pet. App. 11) the prosecutor's argument that the jury should recall the opening statements and compare them with the evidence in the case. The court of appeals correctly held that a prosecutor may remind the jury that an opening statement by defense

counsel, which is not evidence, is not supported by the evidence. *United States* v. *Broadhead*, 413 F. 2d 1351, 1361-1363 (C.A. 7), certiorari denied, 396 U.S. 1017. The instructions to the jury (R. 669), stating at length that the jury should not consider petitioner's silence, effectively dispelled any possible ambiguity in the prosecutor's remarks.

2. Petitioner errs in his contention (Pet. 5, 6) that the prosecutor, in arguing that "the defense panicked" and "couldn't put on a defense," "pointedly invited the jury to draw adverse inferences from Petitioner's silence." Petitioner's counsel conceded below (R. 811, 813) that these remarks were of a "mixed" nature, and the district court regarded them as a permissible reply to the argument of defense counsel. The potential witnesses whom petitioner did not call included his wife and Goldworn, his tax attorney. In view of these persons' potentially decisive knowledge and testimony, their absence justified an inference adverse to petitioner. *Ford* v. *United States*, 210 F. 2d 313, 317 (C.A. 5); *United States* v. *Welp*, 446 F. 2d 867, 868 (C.A. 9). The challenged argument was not a comment on defendant's silence. *United States* v. *Cox*, 428 F. 2d 683, 688 (C.A. 7), certiorari denied, 400 U.S. 881; *Jacobs* v. *United States*, 395 F. 2d 469, 477 (C.A. 8); *United States* v. *Cedar*, 437 F. 2d 1033, 1035 (C.A. 9). There is no merit in petitioner's contention (Pet. 2) that the decision below is in conflict with the First Circuit decisions in *Rodriguez-Sandoval* v. *United States*, 409 F. 2d 529, 530-531, and in *Desmond* v. *United States*, 345 F. 2d 225. Both cases

involved insistent, repetitive argument by a prosecutor that narcotics agents' testimony about narcotic sales to the defendants stood uncontradicted. In *Rodriguez-Sandoval*, the district court's general instructions on a defendant's right of silence were held to be "vague" and in *Desmond* the court of appeals emphasized the complete absence of any possible witness other than the two defendants who might have been objects of the argument.

3. The court of appeals correctly held (Pet. App. 13) that the prosecutor's remarks, even if erroneous, were rendered harmless because of the repeated instructions that closing arguments were not evidence and that a verdict was to be based solely on legally competent evidence. See, *e.g.*, *United States* v. *Toler*, 440 F. 2d 1242 (C.A. 5); *United States* v. *Broadhead*, *supra*. The instructions were adequate to enable the jury to avoid erroneous reliance on inferences from defendant's silence.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1972.

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